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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 2

RED LION BROADCASTING CO., INC.,

and

REVEREND JOHN M. NORRIS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF NATIONAL BROADCASTING COMPANY, INC. AS AMICUS CURIAE

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October 9, 1967

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NATIONAL BROADCASTING COMPANY, INC. AS AMICUS CURIAE

Consent to the filing of this brief *amicus curiae* has been granted by both petitioners and respondents.

The interest of National Broadcasting Company, Inc. in these proceedings.

The petition for certiorari in the above-captioned matter challenges the legality of action taken by the Federal Communications Commission (hereinafter "FCC") in requir-

ing petitioners to make available to a person allegedly subjected to a personal attack on a radio broadcast free time in which to respond to that attack.

While this case was being briefed for the United States Court of Appeals for the District of Columbia, the FCC issued a Notice of Proposed Rule Making, FCC No. 66-291, Docket No. 16574, dated April 6, 1966, 31 Fed. Reg. 5710 (April 13, 1966), which contained a proposed codification of its policies with respect to "personal attacks", such as the one involved in this case, and with respect to editorializing as to political candidates.

The FCC received comments with respect to the proposed rule from approximately 45 groups and individuals, including the National Broadcasting Company, Inc. (hereinafter "NBC"), most of whom opposed the rule. The FCC, however, on July 5, 1967, adopted the rule in essentially the form proposed. 8 F.C.C. 2d 721, 10 R.R. 2d 1901 (1967).

In the case of editorial endorsement or opposition of political candidates the rule requires a broadcasting station (AM, FM, or TV): (1) to give notice within 24 hours (or advance notice if the editorial is broadcast within 72 hours of election day) to the candidates opposed or not endorsed for the same office, (2) to provide such candidates with a script or tape of the editorial, and (3) to offer broadcast time over the station's facilities for a response by a spokesman for such candidates. In the case of a "personal attack" on a program discussing controversial issues of public importance, similar notice and opportunity to respond must be afforded the person or group attacked. On August 2, 1967, the rule was amended by the FCC to exclude from the personal attack section of the rule bona fide

newscasts and on-the-spot coverage of a bona fide news event.* 8 F.C.C. 2d 721, 10 R.R. 2d 1911 (1967).

NBC petitioned for review of this rule in the Court of Appeals for the Second Circuit on September 1, 1967. Similar proceedings had been begun in the Second Circuit by Columbia Broadcasting System, Inc. and in the Seventh Circuit by The Radio Television News Directors Association and eight broadcasting companies. Motions by the FCC to transfer the petitions pending in the Second Circuit to the Seventh Circuit were not opposed by the petitioners and the motions were granted on September 25, 1967. A briefing schedule has been agreed upon by all the parties and approved by the Court which will expedite an early decision in the Seventh Circuit. That schedule contemplates that all briefs will be filed by January 12, 1968.

NBC, as the owner of radio and television broadcasting stations and the operator of radio and television broadcasting networks, has a vital interest in the policies of the FCC in this area. NBC submits this brief *amicus curiae* to urge that this Court defer its decision with respect to whether or not certiorari should be granted in this case until the important questions raised by this case and by the proceedings pending in the Seventh Circuit have been ruled upon by the Seventh Circuit, so that the decisions can be considered jointly by this Court. If the Court believes that it should not delay its action on the petition for certiorari, NBC respectfully requests that certiorari be granted and that briefing and argument on the merits be deferred until the proceeding now pending in the Seventh Circuit can be brought before this Court.

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* A copy of the rule, as amended, is printed as Appendix A hereto.

Argument

History and Development of the FCC Rule to be Reviewed in the Seventh Circuit

In 1941, in *Mayflower Broadcasting Corporation*, 8 F.C.C. 333 (1940), the FCC took the position that it was improper for its licensees to use their facilities for editorializing. Although the Commission actually held that since the applicant had agreed to cease broadcasting editorials it would be appropriate to renew its license, the *Mayflower* decision was taken as a blanket prohibition of editorializing by licensees.

Nine years later, in 1949, after public hearings on the question of editorializing by licensees, the FCC reversed the policy enunciated in the *Mayflower* case and set forth its first detailed statement of the "fairness doctrine" in its Report in the *Matter of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 25 R.R. 1901 (1949).* In paragraph 10 of this Report the FCC for the first time took the position that a person's involvement in a controversial issue of public importance might be a factor which should be considered in determining whether he should be heard as a spokesman for one of the relevant points of view because "elementary considerations of fairness *may* dictate that time be allocated to a person or group which has been specifically attacked over the station. . . ." (Emphasis supplied) (13 F.C.C. at 1252).**

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* The case remains, however, as an example of the reach which the FCC believes it is entitled to give the "fairness doctrine".

** Paragraph 10 of this Report states:

> "It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques

In 1959 the FCC decided in *CBS, Inc.* (*Lar Daly case*), 18 R.R. 701 (1959), that the appearance of a candidate in the course of a newscast was a "use" of a broadcasting station within the meaning of Section 315(a) of the Communications Act requiring the station to give "equal opportunities" to the other candidates for the office. This prompted Congress to amend Section 315(a) by adding a sentence exempting from the "equal opportunities" requirement appearances of candidates on "bona fide newscasts," "bona fide news interviews," "bona fide news documentaries," and "on-the-spot coverage of bona fide news events." The amendment added a second sentence which reads:

> "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." (47 U. S. C. §315(a) (1964))

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of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. *The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist*" (Emphasis supplied) (13 F. C. C. at 1251-52).

The Commission's specific policy with respect to the "personal attack" and "political editorializing" aspects of the "fairness doctrine" was not developed until decisions were rendered in *Clayton W. Mapoles,* 23 R. R. 586 (1962), *Billings Broadcasting Co.,* 23 R. R. 951 (1962), and *Times-Mirror Broadcasting,* 24 R. R. 404 (1962), and was not fully set forth until the FCC's Public Notice dated July 26, 1963, F. C. C. No. 63-734, 25 R. R. 1899 (1963), and the FCC's Public Notice of July 1, 1964 entitled *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415, 2 R. R. 2d 1901 (1964).

The adoption by the FCC of the rule now under attack in the Seventh Circuit added several new dimensions to its previous administration of the "fairness doctrine." First, it established a rigid requirement, applicable to every "personal attack" in connection with a "controversial issue of public importance" in whatever context,* that the person or group attacked be given notification and time to respond; second, it enunciated a rigid requirement that a similar opportunity be afforded whenever a licensee endorses or criticizes a candidate for public office;** and, finally, it elevated both of these requirements to the status of rules, which means that a deviation from them will not only be relevant in license renewal proceedings but may also be punished by fines (47 U. S. C. §502), forfeitures (47 U. S. C. §503(b)) and by license revocation (47 U. S. C. §312(a)(4)).

It is obvious that the action taken by the FCC in the *Red Lion* case 10 R. R. 2d 2001 (1967), and in the adoption of this new rule poses to this Court issues of the most

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* With the limited exceptions contained in paragraph (b) of the rule, as amended on August 2, 1967.

** Although these requirements were anticipated by the FCC's Public Notice dated July 26, 1963, *supra,* the rigidity and penal consequences of a rule were not involved.

fundamental and far-reaching importance. This is so because this Court has never, since commercial radio developed and the FCC began its regulation of broadcasting, spoken to the question whether, or to what extent, the FCC can regulate the content of what is broadcast by radio and television licensees consistently with the Constitution, its statutory mandate, and the proper performance of its regulatory function.

This Court Has Never Approved FCC Regulation of Broadcast Content

Although this Court has upheld the constitutionality of the Communications Act, *NBC* v. *United States,* 319 U. S. 190 (1943), it has never approved FCC regulation of program content. To the extent that it has referred to regulation of that sort, the Court has emphasized the dangers inherent in any venture by the FCC into that area.

Thus, in *NBC* v. *United States, supra,* the Court was careful to point out that Congress had not authorized the FCC to choose among applicants on the basis of "their political, economic or social views . . .". Similarly, in *FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470 (1940), the Court commented that:

> "The Commission is given *no supervisory control of the programs,* of business management, or of policy." (Emphasis supplied.) (309 U. S. at 475).

The question whether the FCC's regulation of broadcasters under the "fairness doctrine" in general, and the "personal attack" and "political editorializing" rule in particular, goes beyond its authority has never been presented to this Court.

The Impact of the Rule

A consideration of some of the obvious or probable effects of the FCC's rule makes evident the fundamental nature of the issues raised by its adoption:

1. *The rule discourages radio and television broadcasters from dealing with controversial issues of public importance.** It is obvious that almost any treatment of a controversial issue involves, either directly or inferentially, an attack on individuals or groups who are involved in or have taken positions with respect to those controversies. If a personal attack occurs, the licensee must incur the administrative burden and expense of making and sending transcripts or summaries to those attacked; he must disrupt his program schedule by providing time periods for any necessary replies; he must suffer the financial penalty of donating time on his facilities if the person attacked chooses not to pay for it; and he must incur the risk that whatever action he takes, the FCC may conclude, either that there was a "personal attack" in material he thought inoffensive, or that his compliance with the rule has been inadequate. It is apparent that the safer course is to avoid broadcasts involving controversial public issues.

2. *The rule will require broadcasters themselves to impose rigorous censorship on those who use their facilities.* Since the broadcaster is accountable, not only for his own use of his facilities to state positions, but for all material broadcast, he must carefully control what is uttered by those who appear on his station in order to insure that their utterances will not expose him to the penalties of a "personal attack" broadcast.

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* That the equal opportunities provision of Section 315 has had a similar effect was acknowledged by the Senate Committee on Interstate and Foreign Commerce in its Report favoring a joint resolution to suspend that provision during the 1960 Presidential campaign (S. Rep. No. 1539, 86th Cong., 2d Sess. (1960)) and by Congress in enacting the suspension (Act of Aug. 24, 1960, Pub. L. No. 86-677, 74 Stat. 554).

Spontaneous discussion of a public issue, for example, will in many instances involve inadmissable risks, and any copy dealing with a public issue will require careful screening. It should also be noted that the material to be screened out is not merely the untrue, the defamatory, or the scurrilous, but anything which is in any respect critical of the "honesty, character, integrity, or like personal qualities" of a person or group. The burdens imposed by the principle are imposed irrespective of the extent to which the criticism is merited and, indeed, irrespective of whether the public interest urgently requires that the criticism be voiced.

3. *The rule, to the extent to which it is successful in securing its objective, insures a bland impartiality in the presentation of views on public issues.* Criticism is muffled by being incorporated in a total context which gives equal voice to every view. Thus the official or private culprit is assured that, whatever he may do, his conduct will receive from that part of the press which is broadcasting a measure of adulation or explanation equal to any criticism. Indeed, since the rule, in effect, subsidizes points of view which are expressed responsively, it may favor some points of view as against others. An example might be where an incumbent official is guilty of some malfeasance. Normally the official is safe unless his activities are publicly exposed and criticized. But if that happens, at least on radio or TV, the Commission would require that his response be subsidized, even though the criticism was paid for. Thus, if equal resources could be mustered in support of the criticism and the defense, the defender would be enabled to command twice as much attention as the attacker.

4. *The rule will place in the hands of the FCC the power, by its interpretations of the rule, to affect in more subtle ways the content of what is broadcast by its licensees.* NBC does not suggest that the Commission has used, or intends to use, the rule in a disingenuous way to achieve unexpressed objectives. Nevertheless

the rule undoubtedly contains many words and expressions of unclear content and susceptible of various interpretations, *e.g.*, "like personal qualities", "controversial issue of public importance", "group", and the like. In the hands of a Commission which chose to exercise it to promote or suppress particular points of view, the power to interpret a rule of such uncertain meaning could be a weapon of considerable force.*

It is evident that the Commission's rule is designed to have, and will have, an enormous impact on what is broadcast by the Commission's licensees. Governmental action having such an impact raises issues which strike at the heart of the democratic process as it functions in this nation.

The Role of the Press

This Court has frequently stated that radio, motion pictures and television enjoy the constitutional protection afforded the "press" by the First Amendment. See, *e.g.*, *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938), ("The press in its historic connotation apprehends every sort of publication which affords a vehicle of information and opinion."); *United States* v. *Paramount Pictures*, 334 U. S. 131 (1948); *FCC* v. *American Broadcasting Co.*, 347 U. S. 284 (1954).

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* Commissioner Loevinger's dissenting opinion in *Mrs. Madalyn Murray*, 5 R. R. 2d 263 (1965) indicates that this problem is by no means hypothetical. In that case the Commission was requested, pursuant to the fairness doctrine, to direct 15 Hawaii radio stations to afford broadcast time for the discussion of atheism. In contrasting the opinions in that case with the opinions in *Brandywine-Main Line Radio, Inc. (WXUR)*, 4 R. R. 2d 697 (1965), Commissioner Loevinger said:

> "The contrasting opinions in that case and this one suggest that the fairness doctrine applies only when viewpoints acceptable to the Commission are denied the opportunity for presentation. This anomaly simply emphasizes the error of the Commission's whole approach to this subject." (5 R. R. 2d at 269)

The necessity of such a rule is evident when we note that, according to a recent survey, more people in this country in 1967 relied primarily on television as a source for news than relied on any other medium. If television and radio are taken together, the reliance on broadcasting was far greater than the reliance on all other media combined. Moreover, the study showed a trend toward increasing reliance on broadcasting.* Thus, if broadcasting were excluded from First Amendment protection, freedom of the press would be denied to what may now be, and is likely increasingly to become, the most important segment of the press.

Underlying the Framers' desire to insure a "free press" was the view that a completely unfettered press would serve as a check on, and critic of, the Government's activities.

After surveying the history underlying the adoption of the First Amendment guarantee of a free press, Mr. Justice

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* Roper Research Associates, "Emerging Profiles of Television and Other Mass Media: Public Attitudes 1959-1967" (April 5, 1967). The relevant question posed by the researchers and the tabulated answers for the last five years were as follows:

"First, I'd like to ask you where you usually get most of your news about what's going on in the world today—from the newspapers or radio or television or magazines or talking to people or where?"

Source of most news	1959 %	1961 %	1963 %	1964 %	1967 %
Television	51	52	55	58	64
Newspapers	57	57	53	56	55
Radio	34	34	29	26	28
Magazines	8	9	6	8	7
People	4	5	4	5	4
Don't know or no answer	1	3	3	3	2

(Multiple answers accepted; column totals therefore exceed 100%.)

Sutherland in *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), commented on the function of the press:

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; . . . . *A free press stands as one of the great interpreters between the government and the people.* To allow it to be fettered is to fetter ourselves." (297 U. S. at 250) (Emphasis supplied.)

See also concurring opinion of Justices Holmes and Brandeis in *Whitney* v. *California*, 274 U. S. 357 (1927).

More recently in *Mills* v. *Alabama*, 384 U. S. 216 (1966), the Supreme Court, speaking through Mr. Justice Black, also commented on the function of the press while striking down, as violating the Fourteenth Amendment, a state statute making it a crime for the editor of a daily newspaper to write or publish an editorial on election day urging people to vote a certain way on issues submitted to them:

> ". . . the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. *Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.*" (384 U. S. at 218-19) (Emphasis supplied.)

In *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 149-50 (1967), this Court made it clear that the important function

of the press in criticizing the activities of public persons extends beyond the category of "public officials."

The guarantee of a free press has never meant and does not mean today, that it is the province of government to secure for every individual, group, or point of view free and equal access to the press.* There are two views which might be taken of the role of the government with respect to the press in a free society. One view might be that the role of the government is to regulate the press in such fashion that it serves as a platform for all voices that wish to be heard. The difficulties with such a view, among others, are that it places the government in a position to control the information and views which are

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* Benjamin Franklin is reported to have said that his newspaper was not a stagecoach with seats for everyone. MOTT, AMERICAN JOURNALISM 55 (3d ed. 1962). A substantial body of case law has subsequently held that there is no right of access to the press. In *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia,* 151 F. 2d 597 (3d Cir. 1945), *cert. denied,* 327 U. S. 779; which involved a federal action by a clergyman whose broadcasting contracts had been broken by defendant's radio station, the court affirmed the dismissal of the complaint on the ground that it failed to state a federal cause of action and stated:

> "Assuming arguendo that the defendant's cancellations of the plaintiffs' contracts have limited plaintiffs' opportunities to speak or preach freely, the First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant is not an instrumentality of the federal government but a privately owned corporation. The plaintiffs seek to endow WPEN with the quality of an agency of the federal government and endeavor to employ a kind of 'trustee-of-public-interest' doctrine to that end. But Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind." (151 F. 2d at 601).

Accord, Massachusetts Universalist Convention v. *Hildreth & Rogers Co.,* 183 F. 2d 497 (1st Cir. 1950); *Lord* v. *Winchester Star, Inc.,* 346 Mass. 764, 190 N. E. 2d 875 (1963), *cert. denied,* 376 U. S. 221 (1964); *Commonwealth* v. *Boston Transcript Company,* 249 Mass. 477, 144 N. E. 400 (1924).

disseminated to the public and that it deprives the press of its active role in criticizing public and private action, and otherwise acting as what Mr. Justice Sutherland called an "interpreter" between the government and the people.

The second view, and the one undoubtedly enshrined in the Constitution, is that the safer and better course is to deprive the government of any power to control and regulate the press, particularly in the area of reporting or comment which might affect political, social, and economic judgments. This Court has frequently recognized that the role contemplated for the press was an active one, that it was to be, not merely a conduit of information or views, but a critic and gadfly. It was viewed as one of the independent but interacting forces which would combine to ensure a government responsive to criticism and reflective of the will of the people. This role of the press was well defined by this Court in *New York Times* v. *Sullivan*, 376 U. S. 276 (1964), by reference to Madison's report on the Virginia Resolutions:

> "Earlier, in a debate in the House of Representatives, Madison had said: 'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: 'In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood: on this foundation it yet stands . . . .' 4 Elliot's Debates, supra, p. 570." (376 U.S. at 275)

This Court has condemned over the years, not merely governmental action overtly suppressing the expression by

the press of particular views, but the subtlest of governmental influences which might mute the press in the slightest degree or discourage it, even minimally, from performing its role. "Freedoms such as [speech, free press] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *Little Rock*, 361 U.S. 516, 523 (1960).

In *Grosjean* v *American Press Co.*, 297 U.S. 233 (1936), this Court struck down a tax based on newspaper circulation as an abridgement of the freedom of the press. In *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965), it was held that even the necessity of returning a reply card in order to secure delivery of Communist mail imposed a sufficient limitation on the "unfettered exercise" of first amendment rights to be unconstitutional. As has been noted above, this Court in *Mills* v. *Alabama*, 384 U.S. 216 (1966), invalidated a statute prohibiting the publication of editorials on election day urging people to vote in a particular way as to the candidates or issues presented to them. The same argument was made in support of that statute that has been made in support of the FCC's rule, *i.e.*, that it promotes fairness by preventing publication of views in circumstances that they cannot be effectively answered. In the *Mills* case this Court found such a justification insufficient to support encroachment on the freedom of the press.

Is Broadcasting Different?

While it is beyond dispute that broadcasting is a part of the "press" and is entitled to the protection of the First Amendment, it is sometimes suggested that there is some peculiarity of broadcasting which warrants greater encroachment on its independence in reporting and commenting on the events of the day. Thus, in upholding the Commission's action in the *Red Lion* case, the Court of Appeals

referred to the fact that "radio inherently is not available to all", emphasized its "unique characteristics", and suggested that the "American people own the broadcast frequencies". (10 R.R.2d 2001 at 2017, 2018).

This Court has never decided, however, that broadcasting is different from other organs of the press sufficiently, and in such a way, as to justify a regulation or dictation of what is to be expressed which would be impermissible if applied to newspapers, magazines, and the like. The concept of ownership of radio frequencies by the people is not a helpful tool in approaching that problem. If anything is to be derived from that concept, it would be as easy to deduce that the government can completely control and dictate what is to be broadcast as it is to arrive at any conclusion short of that.

The characteristic of radio communication which apparently lies at the root of the feeling that more stringent regulation of this part of the press is appropriate is the necessity that different broadcasters not use the same frequency in such a way as to produce interference. But the only conclusion that necessarily follows from this is the conclusion that someone must decide who shall use each frequency. The further conclusion that the government, in addition to parcelling out the frequencies, should limit and control what is broadcast could be justified, if at all, only on the basis that the facilities are so limited and their impact so unique that special limitations, not applicable to other forms of communication, are justified. Specifically, the question posed here is whether the scarcity and uniqueness of broadcast facilities are such as to warrant the particular restrictions imposed by the FCC with respect to "personal attacks."

Analysis of the facts casts considerable doubt on any easy assumption that the characteristics of broadcasting

warrant such limitations. The facts are that the avenues of radio communication are multitudinous and growing in number, that they are more numerous than the voices in the newspaper medium, which is most nearly comparable, and that there is less reason to adopt special protections against "personal attacks" in broadcasting than there is with respect to other media.

In 1965 there were 1751 daily newspapers published in the United States as compared with 5681 broadcasting stations, consisting of 3930 AM radio stations, 1189 FM radio stations and 562 TV stations. The figures for some representative states are as follows:*

	AM	FM	TV	Total Broadcasting	Daily Newspapers
California	223	116	34	373	128
Florida	181	41	17	239	47
Illinois	118	59	20	197	83
Maine	32	5	6	43	9
Nebraska	41	10	13	64	19
New York	149	66	25	240	85
South Dakota	26	2	10	38	12

Comparable figures for the five largest metropolitan areas are as follows:

	1960 Population	Daily Newspapers	Total Broadcasting Stations	AM	FM	TV
New York**	10,694,632	21	79	35	35	9
Chicago	6,220,913	13	79	32	39	8
Los Angeles-Long Beach	6,038,771	21	76	32	35	9
Philadelphia	4,342,897	17	52	23	22	7
Detroit	3,762,360	5	41	12	23	6

* U. S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1966 at pp. 519, 523 (87th ed.).

** In each instance the area referred to is the appropriate Standard Metropolitan Statistical Area (SMSA) as defined by the

An analysis of the situation in the New York Metropolitan Area is instructive.* In that area there are 21 English language daily newspapers,** 9 television stations, and 70 AM and FM radio stations. Many of the 21 daily newspapers have only a small or very local circulation. Thus nine dailies are published in the five counties which make up New York City. Of those nine, however, only three (the *Times*, the *News*, and the *Post*) are of general circulation in the metropolitan area; the other six are published in the other boroughs and have a circulation essentially local. The twelve dailies published outside of New York City consist of nine published in Westchester County, one in Rockland County, and two on Long Island; each of them is the only daily in a "one-daily" town or city; and each of them has essentially a local circulation.***

Broadcasting stations and daily newspapers are comparable media in the sense that each provides current accounts on a daily basis of newsworthy events and activities. It has not been seriously suggested that because newspapers are so few the law of defamation is an insufficient protection against personal attacks so that governmental imposition of fairness is necessary and should be countenanced under the First Amendment. Yet, as the above comparisons show, there are far more broadcasting

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Bureau of the Census. The figures are compiled from COUNTY AND CITY YEARBOOK, 1967, U. S. BUREAU OF THE CENSUS, Table 3; EDITOR AND PUBLISHER YEARBOOK, 1966; BROADCASTING YEARBOOK, 1966; and TELEVISION FACT BOOK, 1966.

* The following discussion is based on the New York Standard Metropolitan Statistical Area (SMSA) as defined by the Bureau of the Census and which includes New York City, Nassau, Suffolk, Westchester and Rockland Counties.

** This includes only general coverage newspapers and excludes specialized publications.

*** Compiled from EDITOR & PUBLISHER YEARBOOK, 1966 and BROADCASTING YEARBOOK, 1966.

voices than newspaper voices around the country, and in particular localities.* If constitutional distinctions are to be based on a comparison between the number of newspapers and the number of broadcasting facilities, it should also be noted that the number of newspapers is on the decline and the number of broadcasting stations on the increase.**

Moreover, the need for protection against personal attack, if one exists, must surely be greater with respect to newspapers, and other printed media, than it is with respect to broadcasting. A broadcast attack may be widely or narrowly heard, but in either event it is ephemeral and in many instances not noted or quickly forgotten. The printed slur is lasting, permanently available to do continuing damage to the person attacked. Yet the FCC's rule requires that time for response be given, however negligible the slur, however passing the reference, and however little value to the public there may be in giving expression to the response. Rather than being designed to secure a broadcasting service more in the public interest the Commission's rule seems better calculated to provide a kind of vindication for supposed private rights not available with respect to personal attacks in other segments of the press.

It is apparent that the conclusion cannot easily be reached that the number or character of broadcasting facilities is such as to warrant any qualification, with respect to broadcasting, of the freedom of the press which the First Amendment guarantees.

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* It will be noted that the FCC rule draws no distinction between AM, FM and TV nor does it draw any distinctions based on the number of broadcasting voices in the particular area where the alleged "personal attack" is made.

** U. S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1957 (1960), pp. 491-92.

Statutory Authorization

While the question arising under the First Amendment is the most fundamental issue raised by the FCC's action, there are other important issues short of the constitutional question.

There is, first of all, the question whether Congress has provided any statutory authorization for what the Commission has done which is sufficiently explicit to warrant regulation affecting so profoundly the freedom of the press.

The Commission purports to find support for the personal attack rule, and for the action challenged in the *Red Lion* case, in a phrase in Section 315(a) of the Communications Act, introduced into the statute in 1959, providing that nothing in the material added to that section by the 1959 amendment "shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage on news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." (47 U.S.C. §315(a) (1964))

At the outset, it is significant that the quoted language did not purport to be an express delegation to the Commission of any particular authority, rulemaking or otherwise. It would be unusual to derive a far-reaching authority to regulate the press from language designed only to prevent an implied repeal.* Moreover, the phrase "reasonable opportunity for the discussion of conflicting views on issues of public importance" hardly amounts to explicit authorization of the personal attack rule or, indeed, program-by-program regulation of any sort.

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* This would be particularly difficult in the light of the specific prohibition of program censorship contained in Section 326 of the Communications Act, 47 U. S. C. §326.

In any event, Congress could hardly have meant to endorse or approve the Commission's policy with respect to personal attacks since that policy was not developed in anything approaching its present form until several years after the 1959 amendment. Insofar as the Commission's Report on Editorializing, published in 1949, referred to personal attacks, it merely suggested that personal involvement in a controversy "may also be a factor" to be considered along with other factors in determining whether "fairness" requires that a particular spokesman be heard. Prior to 1959, the Commission had never imposed a rigid requirement of the sort which it has now adopted.

If the Commission's personal attack rule was not approved or authorized by Congress in its 1959 amendment to Section 315, then the only statutory source for the Commission's action is the "public interest necessity and convenience" clause of the Act. 47 U.S.C. §303 (1964)

It has, of course, been established by this Court's decisions in many cases that, where administrative action impinges upon fundamental rights guaranteed by the Constitution, that action must be supported by an explicit Congressional decision to authorize it if it is to be sustained. *E.g., Hannegan* v. *Esquire,* 327 U. S. 146 (1946); *Kent* v. *Dulles,* 357 U. S. 116 (1958); *Greene* v. *McElroy,* 360 U. S. 474 (1959). As this Court said in the *Greene* case, "Such decisions cannot be assumed by acquiescence or non-action." (360 U. S. at 507)

There is obviously a serious question whether there is anything in the Communications Act, or any amendment to it, which explicitly confers on the Commission the far-reaching power over broadcasting licensees which it has purported to exercise in the *Red Lion* case and in adopting the rule under attack in the Seventh Circuit.

Finally, even if Congress has authorized the Commission to promulgate rules of this sort, there is the further question whether on the record before it, there was a

sufficient factual and evidentiary basis for the adoption of this rule. Neither the record of that proceeding nor anything in the Commission's prior rulings or experience discloses that this rule was adopted in response to a widely-felt or evidenced need or to protect any clearly threatened public interest. Thus, there is no suggestion that the Commission has encountered widespread irresponsibility on the part of broadcasting licensees in their coverage of controversial public issues and personalities. Indeed, the indications are all to the contrary.* Surely, even if the Commission has both constitutional and statutory authorization to regulate broadcasting in this fashion, it should only be done if there is a clear demonstration that governmental action which creates such a threat to the freedom of this segment of the press is warranted by urgent public need.

Consideration of this Case Should be Deferred.

It is submitted that the foregoing is sufficient to demonstrate that the issues presented by the Commission's action in this case, and by its action in adopting the rule under attack in the Seventh Circuit, raise fundamental questions requiring the closest scrutiny by this Court, on the best possible record.

NBC submits that these questions can best be considered by this Court if it defers consideration of the petition in this case until a decision by the Court of Appeals for the Seventh Circuit, and an opportunity to bring that decision before this Court for review. Such action will not unduly delay the consideration of the *Red Lion* petition since,

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* Thus, in a recent address to the International Radio and Television Society, Chairman Hyde of the FCC indicated that he had "not the slightest doubt" that as "a matter of conscience" responsible broadcasters would comply with the political editorial requirement even if there were no rule. (F. C. C. Public Notice—6223, September 21, 1967).

under the briefing schedule agreed upon by all the parties, and approved by the Court, the petitions in the Seventh Circuit can be brought on for hearing there early next year.

The *Red Lion* case presents the application of the FCC's personal attack policy in the context of a particular controversy illustrating the kind of impact which the policy will have upon particular broadcasters. The Commission's action in the *Red Lion* case is undoubtedly illustrative of the manner in which the Commission's rule will be construed and, presumably, the Commission would have reached the same result in the *Red Lion* case if it had arisen subsequent to the adoption of the rule. On the other hand, since the adoption of the rule, it is the rule which will govern future Commission action and it is the rule which has a direct and immediate impact upon all of the Commission's licensees. The validity of the FCC's action in the *Red Lion* case can best be considered against the background of the rule which the Commission subsequently adopted.

It is submitted that the Court should have before it both the rule and the specific application of the Commission's policy before it determines whether the Commission's actions in this area are valid. Moreover, a broader segment of the broadcasting industry is represented before the Seventh Circuit inasmuch as two networks, eight broadcasting companies, and the Radio Television News Directors' Association have all appeared there. Finally, the decision of the Court of Appeals for the Seventh Circuit, after briefing and argument with respect to the impact of the rule, is likely to be of aid to this Court in canvassing the issues which will be presented to it by these two cases.

Conclusion

For the reasons stated, NBC, as *amicus curiae,* respectfully urges the Court to defer consideration of the petition for certiorari herein until after a decision by the Court of Appeals for the Seventh Circuit or, in the alternative, that it grant certiorari and defer briefing and argument on the merits pending such a decision.

Respectfully submitted,

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APPENDIX A

Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§73.123, 73.300, 73.598 and 73.679 (which read identically):

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable (i) to attacks on foreign groups or foreign public figures; (ii) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newcasts or on-the-spot coverage of news events).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.